Supreme Court, U.S.
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No. 99-284

IN THE

Supreme Court of the United States

JAMES PAPA,

Petitioner,

v.

KATY INDUSTRIES, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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LIST OF PARTIES AND RULE 29.6 STATEMENT

Respondent Katy Industries, Inc. is a publicly held corporation, and Gabelli Funds, Inc. is the beneficial owner of 18.77% of its outstanding stock.

Respondent Walsh Press Company, Inc. is a wholly-owned indirect subsidiary of Katy Industries, Inc.

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STATEMENT OF THE CASE

Both the Age Discrimination in Employment Act ("ADEA") and the Americans With Disabilities Act ("ADA") define "employer" to require that, to be covered by the acts, an employer must (a) affect interstate commerce and (b) have at least a specified number of employees (20 for the ADEA and 25 for the ADA during the times relevant here).[1] The Petitioner's employer, Walsh Press Co., Inc., concededly did not meet these minimum-number requirements. R. 22, ¶¶ 5-6. The Petitioner therefore sued not only Walsh, but Walsh's ultimate corporate parent, Katy Industries, Inc., claiming that the separate corporations should be aggregated to satisfy the minimum-number requirements. R. 1, ¶ 7. The sole issue is whether there is a basis to aggregate the corporations as the Petitioner's "single employer."

The Petitioner suggests that the Seventh Circuit found "substantial integration" between Walsh and Katy, sufficient to satisfy a so-called "four-factor test" used by the NLRB. Petition at 6. This suggestion is untrue. The district court, considering the four factors urged by the Petitioner to evaluate the facts developed in the summary judgment briefing, held there was no basis to aggregate Walsh and Katy. App. B-10-11. The Seventh Circuit likewise held there was no basis to aggregate Walsh and Katy, though it refined the framework for evaluating the facts. App. A-9-10.

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1. 29 U.S.C. § 630(b) (ADEA); 42 U.S.C. § 12111(5)(A) (ADA). The minimum number under the ADA changed from 25 to 15 on July 26, 1994. The district court held that the 25-employee requirement applied here because the Petitioner was notified of his layoff in May 1994 (though the layoff took effect July 31, 1994). App. B-3, 8-9. *Cf. Delaware State College v. Ricks*, 449 U.S. 250, 257-58 (1980) (claim of discrimination arises when employee is notified of adverse employment decision, not when consequences of decision occur). The Petitioner did not challenge this holding on appeal. *See* Brief of Defendants-Appellees (filed with Seventh Circuit August 28, 1998) at 8 n.3.

Nothing in the Seventh Circuit's opinion suggests that, under any framework, the criteria for aggregating Walsh and Katy would be satisfied. On the contrary, the Seventh Circuit stated that Walsh "complie[d] with all the formalities required of a subsidiary that wants to have a corporate identity different from that of its parent," and that its "integration" with its ultimate parent, Katy — e.g., by being included in Katy's group pension plan — was, so far from being "substantial," an unremarkable incident of a small firm taking advantage of the services of its corporate affiliates.[2]

Other than erroneously characterizing the Seventh Circuit's analysis, the Petitioner does not set forth the facts about the relationship among himself, Walsh, and Katy. The facts are as follows.

The Petitioner was hired as a machinist by Walsh on May 2, 1983, when he was 51 years old. R. 7, ¶¶ 12-13. Walsh

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2. App. A-2; *see* App. A-8-9:

> Firms too tiny to achieve the realizable economies of scale or scope in their industry will go under unless they can integrate some of their operations with those of other companies, whether by contract or by ownership. The choice between the two modes of integration is unrelated to the [small-employer] exemption. Take contractual integration first. A firm too small to have its own pension plan will join in a multiemployer pension plan or will in effect pool with other employers by buying an insurance policy. . . . [Such] contractual integration would [not] subject tiny employers to the antidiscrimination laws, because the integration is not of affiliated firms. Why should it make a difference if the integration takes the form instead of common ownership, so that the tiny employer gets his pension plan . . . from his parent corporation without contractual formalities, rather than from independent contractors?
>
> That is all that's involved in the case[ ] before us. . . .

was a manufacturer and servicer of power presses, located in Forest Park, Illinois. R. 7, ¶ 5.

In 1987 Walsh was acquired by and became a subsidiary of American Gage & Machine, which in turn is a wholly-owned subsidiary of Katy, a holding company. R. 22, ¶ 35. Katy was the ultimate parent of a substantial number of operating companies in three principal groups (Industrial Machinery, Industrial Components, and Consumer Products). R. 26, Ex. 16. Katy was a Delaware corporation, located in Elgin, Illinois until 1994 and in Englewood, Colorado thereafter. R. 22, ¶ 39.

The record fully supports the Seventh Circuit's statement that Walsh complied with all corporate formalities required to maintain its separate corporate identity: Walsh and Katy had separate facilities (R. 22, ¶ 39), separate equipment (*id.* ¶ 41), separate supplies (*id.* ¶ 40), separate corporate records (*id.* ¶ 44), separate directors (*id.* ¶ 56), and separate workers (*id.* ¶ 23). Walsh paid its own taxes, handled its own payroll, and issued its own W-2s. *Id.* ¶¶ 11-12, 80. Walsh's president, Jerome W. Heyda, had been employed by Walsh since 1972 and never worked for Katy. *Id.* ¶ 9; R. 23, Exs. 3-4. Heyda, and no employee of Katy, hired the Petitioner and directed his work. R. 22, ¶¶ 8, 10. Heyda had authority to hire, fire, discipline, and determine compensation (limited only by Walsh's self-created annual budget) for Walsh employees without Katy's consent or approval. *Id.* ¶¶ 64-66; R. 32, ¶¶ 38-43. Heyda, and not Katy, directed Walsh's day-to-day operations. *Id.* ¶ 73.

There were, of course, some contacts between Walsh and Katy. Like the other operating companies, Walsh submitted annual business plans, serving as budgets, to Katy. *Id.* ¶ 74. Walsh also provided Katy monthly financial reports regarding profits and losses, cash flow, and inventory. *Id.* ¶ 76. Katy

made certain services available to its affiliates. For example, though Walsh obtained health insurance for its employees on its own, it obtained (and paid for) workers' compensation, employee disability, liability, and vehicle insurance from carriers selected by Katy. *Id.* ¶¶ 71-72. Until 1990, Walsh provided its employees a 401(k) plan, but thereafter Katy made a group 401(k) plan available to its subsidiaries; like all the subsidiaries, Walsh adopted that plan and paid the employer contributions. *Id.* ¶¶ 78-79. Though Walsh had certain individual bank accounts, Katy also provided a bank account to its subsidiaries, with subaccounts for each company; when Walsh drew on its subaccount, the transaction was charged to Walsh. R. 22, ¶ 43; R. 32, ¶ 24. A Katy employee assisted Walsh in setting up a computer system. R. 23, ¶ 88; R. 22, ¶ 21. A Katy employee spent two days at Walsh assisting in the removal of an underground storage tank. R. 32, ¶ 85. Katy employees were available to consult on accounting, legal, environmental, and tax matters. *Id.* ¶ 86. Some of Katy's officers also served as officers or directors of Walsh, though they were not involved in Walsh's labor and employment decisions. R. 22, ¶¶ 57-58; R. 32, ¶¶ 5-12.

Walsh did not meet its plans and was not profitable in 1993 and afterward. R. 32, ¶¶ 4, 19. In early 1994 a decision was made to discontinue part of Walsh's operations, the manufacture and rebuilding of presses, because it was not profitable. R. 22, ¶ 82. The parties disputed below who made that decision: Heyda and the Katy officer with whom he spoke testified that Heyda made the decision, but the Petitioner contended Heyda had said the decision was "corporate" and "not his." *Id.*; R. 32, ¶¶ 44-53. The Seventh Circuit assumed that Katy made the decision. App. A-2. In any event, there is no dispute that it was Heyda who chose which employees to lay off as a result of the discontinuance. R. 26, ¶¶ 27-29. In March or April 1994 Heyda told Walsh employees there would be layoffs, though he had not yet

decided which employees would be affected. *Id.* ¶¶ 27-28. In May 1994 Heyda announced that certain employees, including the Petitioner, would be laid off. *Id.* ¶¶ 29-30. The Petitioner's last day was July 31, 1994. *Id.* Walsh never regained profitability. R. 32, ¶¶ 4, 19. In April 1996 the assets of Walsh were sold, and Walsh is no longer an operating company. R. 22, ¶ 38.

The Petitioner named both Katy and Walsh in his complaint, contending that they should be considered a "single employer." He urged that his claim be analyzed using four considerations used in certain circumstances by the NLRB: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership. He argued that there was interrelation, commonality, and centralization by invoking such matters as the services Katy afforded its subsidiaries (group insurance, employee benefits plans, consolidated tax returns and annual reports, subaccounts in its bank account, consulting on matters like computer system setup) and the reporting lines from Walsh to Katy (annual plans/budgets, monthly financial reports).

The Petitioner even contended that Katy admitted it was his employer. For example, he argued that Katy so admitted by reporting the total number of employees of the affiliated companies in its annual report (Brief of Plaintiff-Appellant (filed with Seventh Circuit June 30, 1998) at 22) — overlooking that it was a *consolidated* report. He particularly emphasized that COBRA benefits were offered to Walsh's departing employees, and that since COBRA "of course only extends to employers employing 20 employees," Katy thereby admitted that Walsh's employees should be aggregated for employment law purposes. *Id.* at 22-23; Reply Brief of Plaintiff-Appellant (filed with Seventh Circuit Sept. 25, 1998) at 7. He overlooked that, although COBRA applies

only to "employers" with 20 or more employees, COBRA defines "employer" as including all affiliated companies in the aggregate.[3]

The Petitioner particularly urged that Katy's asserted decision that Walsh should discontinue a portion of its business constituted "control of labor relations" at Walsh, on the ground that the decision inevitably would lead to layoffs. Brief of Plaintiff-Appellant at 8-10, 23.

After discovery, the defendants moved for summary judgment on the ground that the minimum-number requirements of the ADEA and ADA were not met. R. 20. The district court treated the motion as one challenging subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1),[4] and dismissed the case. App. B-1-12. Using the "four-factor" framework requested by the Petitioner, the district court observed that the evidentiary record did not show that the relationship between Walsh and Katy was anything other than

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3. *See* IRC § 414(t) (providing that certain sections, including section 4980B (COBRA), are subject to "controlled group rules," requiring that employees of affiliated companies be "treated as employed by a single employer"); 64 Fed. Reg. 5160, 5162, 5175 (Feb. 3, 1999) (implementing same, in same manner as prior proposed regulations).

4. Several circuits treat this question as one of subject-matter jurisdiction. *Hukill v. Auto Care, Inc.*, 1999 WL 739407, at *4 (4th Cir. Sept. 22, 1999); *Armbruster v. Quinn*, 711 F.2d 1332, 1335 (6th Cir. 1983); *Baker v. Stuart Broad. Co.*, 560 F.2d 389, 392 (8th Cir. 1977); *Childs v. Local 18, IBEW*, 719 F.2d 1379, 1382 (9th Cir. 1983); *McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 932 (11th Cir. 1987). The Seventh and D.C. Circuits treat it not as jurisdictional but as an element of the plaintiff's substantive case. *Komorowski v. Townline Mini-Mart & Restaurant*, 162 F.3d 962, 964 (7th Cir. 1998); *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 623-24 (D.C. Cir. 1997). In either case, the question is one susceptible to summary judgment on an evidentiary record like that developed here.

that of separate, affiliated companies. App. B-3-5, 10-11. In particular, the evidence did not suggest that there was "such extensive control over the subsidiaries' operations and personnel decisions that, in effect, the two corporations are one." App. B-10. Nor did the record show that the Petitioner was misled about the identity of his employer — a fifth factor also suggested as important. App. B-5-6, 11.

On review, the Seventh Circuit affirmed, but refined the framework of analysis. It noted that both it and other circuits have often "structur[ed] their analysis" of this kind of question by "cit[ing] or recit[ing]" the four factors. App. A-3-4; *see, e.g., Rogers v. Sugar Tree Prods., Inc.*, 7 F.3d 577, 582 (7th Cir. 1994). But because that bare recitation does not prescribe how to weigh the considerations, and because the factors as stated are either "useless" (all parents/subsidiaries have "common ownership") or "vague" (how "integrated" must two companies be to be aggregated?), App. A-4, the court restated more directly and precisely the circumstances in which courts find it appropriate to aggregate the employees of separate companies for purposes of the minimum-number requirements of the employment discrimination laws. In doing so, the Seventh Circuit did not itself believe it was substantively departing from its prior opinions, like *Rogers*: if it did, it would have been required by Seventh Circuit Rule 40(e) to circulate the opinion to the entire court for en banc consideration before publication.

Putting unhelpful labels aside, the Seventh Circuit described three situations in which courts should and do aggregate nominally separate companies for purposes of employment discrimination laws: (1) when the nominal separateness of the companies would be disregarded under traditional and well-developed corporate-veil-piercing analysis; (2) when the discriminatory conduct complained of was actually that of the nominally separate company; and (3) when an enterprise splits itself into a number of companies, separate in form, for the express purpose of

evading liability under the employment discrimination laws. App. A-5-8. Because none of these circumstances existed here (or in another case the Seventh Circuit consolidated with *Papa v. Katy* for decision, presenting a similar question under the minimum-number requirement of Title VII[5]), the Seventh Circuit affirmed. App. A-10-11.

REASONS FOR DENYING THE WRIT

The Petition is based at heart on three propositions: (1) that there exists a crisp "four-factor test" of corporate separateness, created by the Labor Board and applied in traditional labor cases under the NLRA; (2) that such a Board test has been adopted by many circuits as the test for determining corporate separateness under the antidiscrimination laws, and must be applied liberally in light of the statutes' remedial purposes; and (3) that the Seventh Circuit's decision below adopts a radically different and inconsistent test, creating a frank circuit split. None of these propositions is true.

As discussed in Section I, there is no underlying strict "four-factor test" in the traditional labor context. The Labor Board approach, as refined and developed in NLRA cases, treats the "four factors" as neither rigid nor exclusive, and in fact parallels the Seventh Circuit's approach, by: (1) deeming "actual control of labor relations" the critical issue, and "common ownership" insignificant; (2) using traditional veil-piercing inquiries; and (3) disregarding corporations' separateness when the corporations have been split for the purpose of evading the law.

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5. The Petitioner noted that the time for filing the Petition was extended to coordinate more closely with the schedule in the other case, *EEOC v. GJHSRT, Inc.*, in which any petition for writ of certiorari by the EEOC would be due by September 11, 1999. Petition at 2 n.1. The EEOC did not, however, file a petition for writ of certiorari in *GJHSRT*.

As discussed in Section II, though many circuits have adopted the "four-factor" designation in discrimination cases, in substance their approaches parallel those of the Board, and are likewise substantively in harmony with the Seventh Circuit's approach. The Seventh Circuit's innovation was more in name than in substance. The "four factors" do not accurately describe the courts' actual analyses. By placing more direct and accurate names on analyses familiar to the other circuits, the Seventh Circuit did not create a circuit split calling for review.

Indeed, if any conflict is presented here, it is between the position advocated by the Petitioner and the decisions of this Court. The Petitioner's open plea to read into the antidiscrimination statutes a liberal rule for overriding corporations' limited liability, based on nothing more than the statutes' remedial purpose, Petition at 7-10, flies directly in the face of *United States v. Bestfoods*, 524 U.S. 51, 118 S. Ct. 1876, 1885 (1998), in which the Court held that, despite a statute's remedial purpose, "the failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that '[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law,' " and that "when (but only when) the corporate veil may be pierced may a parent corporation be charged with derivative . . . liability for its subsidiary's actions." (alteration in original) (footnote omitted) (quoting *United States v. Texas*, 507 U.S. 529, 534 (1993)).

Nor is the issue raised here one of exceptional importance, either in the present case or in general, so as to call for review. As discussed in Section III, there is no exceptional importance in the present case, for the facts cannot support aggregation of Katy and Walsh under any test. Nor is there exceptional importance in the abstract, for there is no substantive split of authority in need of resolution.

I. THE SEVENTH CIRCUIT'S DECISION DOES NOT SPLIT FROM DECISIONS UNDER THE NLRA.

The Petitioner asserts that a "four-factor test" — supposedly "formulated by the National Labor Relations Board" and "approved" by the Court — is "uniquely appropriate" for determining when nominally separate firms should be treated as a single employer under federal antidiscrimination statutes, and that the Seventh Circuit's decision conflicts with this test. Petition at 9. These assertions are untrue: (1) the Board never said the four factors are a rigid "test," nor has the Court done so; and (2) the practice in NLRA cases does not conflict with the Seventh Circuit's decision.

A. There is no Rigid Four-Factor Test for NLRA Cases.

The Petitioner's claim that courts should use the "four-factor test" in cases arising under federal antidiscrimination statutes rests on the unstated premise that the Board actually decreed — and the Court has mandated — a rigid test for deciding "single employer" issues in traditional labor cases. But the premise is incorrect. The four factors were not formulated as a rigid test, nor have they been so applied in NLRA cases. On the contrary, the practice under the NLRA mirrors rather than contrasts with the Seventh Circuit's approach.

1. *Origins of the "Four Factors."*

The Petitioner does not discuss the origins or use of the supposed "four-factor test;" he merely claims that the Board "formulated" it and the Court "approved" it. Petition at 9. This bare assertion masks a rich history during which the Board developed the "single employer" doctrine, both as a

principle for asserting discretionary jurisdiction[6] and as one of many theories for imposing joint and several liability for unfair labor practices.[7] *See, e.g., Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 504 (5th Cir. 1982); *NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 551-52, 553-54 (3d Cir. 1983).

In its 1956 Annual Report, which the Court cited in *Radio & Television Broadcast Technicians Local Union 1246 v. Broadcast Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965) (per curiam), the Board discussed the early development of the single employer doctrine:

> In applying present [self-imposed] jurisdictional standards, the Board early reaffirmed the long-established practice of treating separate concerns which are closely related as being a single employer for purposes of determining whether to assert jurisdiction. The question in such cases is whether the enterprises are sufficiently integrated to consider the business of both together in applying the jurisdictional standards.

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6. Although the Board has jurisdiction over all labor disputes affecting interstate commerce, regardless of the employer's size, it does not assert jurisdiction in all cases. Instead, the Board applies self-imposed jurisdictional minimums, often stated in terms of minimum gross revenues. *See, e.g., Radio & Television Broadcast Technicians Local Union 1246 v. Broadcast Serv. of Mobile, Inc.*, 380 U.S. 255, 255-56 (1965) (per curiam) ($100,000 minimum for radio stations). In determining whether a particular firm meets the jurisdictional minimum, the Board will consider whether two or more firms constitute a single employer. *See, e.g., Parklane Hosiery Co.*, 203 N.L.R.B. 597, 598 (1973).

7. As discussed in Section I.B. below, the Board will impose joint and several liability for unfair labor practices on nominally separate firms in a variety of circumstances, even when it does not find that the two firms constitute a "single employer." *See, e.g., id.* at 613-19.

> The principal factors which the Board weighs in determining whether sufficient integration exists include the extent of:
>
> 1. Interrelation of operations;
> 2. Centralized control of labor relations;
> 3. Common management; and
> 4. Common ownership or financial control.
>
> No one of these factors has been held to be controlling, but the Board opinions have stressed the first three factors, which go to show "operational integration," particularly centralized control over labor relations. The Board has declined in several cases to find integration merely upon the basis of common ownership or financial control.

21st Annual Report of the National Labor Relations Board at 14-15 (1956), *quoted in Sakrete of N. Cal., Inc. v. NRLB*, 332 F.2d 902, 905 n.4 (9th Cir. 1964) (*enforcing* 137 N.L.R.B. 1220 (1962)).

This statement, with its list of non-exclusive considerations, is the root of the "four-factor test" urged by the Petitioner. In *Radio Union*, the Court "recognized" the criteria that the Board had considered in applying the single employer doctrine. *South Prairie Const. v. Local 627*, 425 U.S. 800, 802 & n.3 (1976) (per curiam). But contrary to the Petitioner's assertion (Petition at 9), the Court did not "approve" these criteria as a "four-factor test," as the context in which *Radio Union* arose makes clear.

The case concerned whether Alabama state courts erred in assuming jurisdiction over a picketing dispute. The state courts could assume jurisdiction only if the Board declined to assert it, a decision resting in the Board's discretion. *Radio Union*, 380 U.S. at 256. Because the Board had not considered whether to assert jurisdiction, the Court looked at the factors the Board would consider. *Id.*, *citing*, *e.g.*, NLRB 21st Annual Report at 14-15 and *Sakrete*. The Court noted that evidence supported each of the criteria, raising at least the possibility that the Board might exercise jurisdiction.[8] In those circumstances, the Court held that the Alabama courts erred in asserting jurisdiction. *Id.* at 257. The Court therefore neither mandated factors for the Board to consider in future cases nor foreclosed it from refining the single-employer doctrine.

2. *Refinement of the "Four Factors" By the Board.*

In fact, the Board *has* refined how it approaches single-employer issues. Though it has frequently cited *Radio Union* and referred to the four criteria listed in its 1956 Annual Report in single-employer-doctrine cases,[9] it has also repeatedly stated (echoing a theme of the 1956 Report) that "[n]one of these factors, alone, is controlling, nor need all of them be present." *Emsing's*, 284 N.L.R.B. at 302. *See also*, *e.g.*, *Sakrete*, 322 F.2d at 905 n.4 (*enforcing* 137 N.L.R.B. 1220 (1962)).

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8. Indeed, the United States as amicus curiae "confirm[ed] the view that the Board's standards for determining a single employer were fully satisfied," 380 U.S. at 257 n.*, making it unnecessary for the Court to consider the weight the Board would give the criteria, much less how it would rule if evidence of certain criteria — such as centralized control over labor relations — were lacking.

9. *See*, *e.g.*, *Parklane Hosiery*, 203 N.L.R.B. at 612; *Emsing's Supermarket, Inc.*, 284 N.L.R.B. 302, 302 & nn.3-5 (1987), *enforced*, 872 F.2d 1279, 1289 (7th Cir. 1989); *Dow Chem. Co.*, 326 N.L.R.B. No. 23, 1998 WL 560744, at *3 (NLRB Aug. 24, 1998).

As the Board has refined and developed the single employer doctrine over several decades, it has made clear that the "critical" consideration is whether one firm actually controls another nominally separate firm's labor relations. *See, e.g., Parklane Hosiery*, 203 N.L.R.B. at 613 ("[the] Board has long held that the most critical factor relied upon when it considers whether a joint employer relationship exists will be the control which one party may or may not exercise with respect to another's labor relations"); *Western Union Corp.*, 224 N.L.R.B. 274, 277 (1976) ("evidence to support a finding of central control over labor relations policies" is "the critical factor" — and a "requisite" one — in deeming separate firms a single employer), *enforced, United Tel. Workers v. NLRB*, 571 F.2d 665, 667 (D.C. Cir. 1978); *Dow Chem. Co.*, 1998 WL 560744, at *4 ("centralized control of labor relations" is "the 'critical' factor"); *Emsing's*, 284 N.L.R.B. at 302 (finding a single employer when "all management decisions of any significance" and "labor relations policies" for two nominally separate stores were "made jointly" by the stores' co-owners). Such control must be "actual and active," not merely "potential." *Western Union*, 224 N.L.R.B. at 276.

The Board's refinement of its approach has also made the "common ownership" consideration fade to insignificance. For example, in *Dow Chemical* it noted that common ownership will "of course" be present when the nominally separate firms are a parent and subsidiary, and cannot "alone . . . establish the single-employer relationship." 1998 WL 560744, at *2. "Common ownership by itself indicates only potential control over the subsidiary by the parent entity; a single-employer relationship will be found *only if* one of the companies exercises actual or active control over the day-to-day operations or labor relations of the other." *Id.* (internal footnote omitted) (emphasis added), *citing Los Angeles Newspaper Guild Local 69 (Hearst Corp.)*, 185 N.L.R.B. 303, 304 (1970), *enforced*, 443 F.2d 1173 (9th Cir.

1971). In *Western Union*, the Board rejected the ALJ's finding that a parent and four subsidiaries were a single employer because "only common ownership is present here," and "common ownership is not determinative when [the] requisite common control is not shown." 224 N.L.R.B. at 276 & n.3. The Board refused to endorse an approach that "would result in an automatic finding in every case that a wholly owned subsidiary or the constituent companies of a conglomerate are a single employer." *Id.* at 275.

B. There is no Conflict Between the Seventh Circuit and NLRA Decisions.

The Petitioner asserts that the Seventh Circuit's approach conflicts with the Board's supposedly "uniquely appropriate" and "uniquely crafted" "four-factor test" (Petition at 9, 12), without discussing any of the Board's decisions or how the Board has crafted them. In fact, the Seventh Circuit's approach echoes, and does not conflict with, the Board's approach in the foregoing cases. For example, the Seventh Circuit's observation that "common ownership," by itself, is "useless" (App. A-4) echoes the Board's similar observation in *Dow Chemical* and *Western Union*. The Seventh Circuit's conclusion that a parent and subsidiary may be aggregated when the parent "might have directed the discriminatory act, practice, or policy of which the employee of its subsidiary was complaining" (App. A-7) echoes the Board's view, expressed in cases like *Parklane Hosiery*, *Dow Chemical*, and *Western Union*, that actual control over labor relations is the critical consideration.

Indeed, though the Petitioner asserts that the "four-factor test" is "uniquely crafted" (Petition at 12), the single employer doctrine is not the "unique" rationale under which Board aggregates nominally separate firms. *See, e.g., NLRB v. Fullerton Transfer & Storage Ltd.*, 910 F.2d 331, 340 (6th Cir. 1990) ("there is no one test for deciding when to disregard the corporate form and bind the owners-operators

of a closely held corporation"). In fact, the Board uses a number of approaches in addition to the single employer doctrine, two of which echo two of the standards articulated by the Seventh Circuit.

For example, like the Seventh Circuit, the Board disregards corporations' separate existence when conditions for traditional veil-piercing are met. *See, e.g., White Oak Coal Co.*, 318 N.L.R.B. 732, 734-35 (1995) (endorsing as a matter of federal common law the two-pronged analytical framework for veil-piercing issues discussed in *NLRB v. Greater Kansas City Roofing*, 2 F.3d 1047, 1055 (10th Cir. 1993)), *enforced mem.*, 81 F.3d 150 (4th Cir. 1996).

And just as the Seventh Circuit would disregard the separation of affiliates if they were established for the purpose of avoiding liability under the federal antidiscrimination statutes (App. A-6), the Board imposes liability under the so-called "alter ego doctrine" when "a purportedly separate business entity [is] functioning as [a] subordinate instrumentality or disguised continuance" of another firm. *Parklane Hosiery*, 203 N.L.R.B. at 614, *citing Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942). *See also Al Bryant*, 711 F.2d at 553 ("the focus of the alter ego doctrine, unlike that of the single employer doctrine, is on the existence of a disguised continuance or an attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or a technical change in operations") (internal citation and quotation omitted); *Fullerton Transfer*, 910 F.2d at 336-37 (characterizing this approach as a "relaxed alter ego" doctrine to distinguish it from the alter ego analysis used in traditional veil-piercing cases). This "alter ego doctrine" is independent of the single-employer doctrine. For example, in *Parklane Hosiery*, the Board imposed liability on a franchisor under the alter ego doctrine (because the franchise arrangement was, in fact, a sham transaction designed to evade federal labor law),

203 N.L.R.B. at 614-19, even though it refused to impose liability under the single employer doctrine (because the franchise arrangement, "considered pro forma without regard for whatever may have motivated its formation," was facially legitimate), *id.* at 613.

The Petitioner's argument that the analysis applied in cases under the NLRA should serve as the model for the proper analysis in antidiscrimination statute cases — asserted without examination of the NLRA cases — therefore falters at the outset. The Petitioner's premise that the Seventh Circuit radically departed from the NLRA approach evaporates upon examination.

II. THE SEVENTH CIRCUIT'S DECISION DOES NOT CREATE A SPLIT OF DECISIONS UNDER FEDERAL ANTIDISCRIMINATION STATUTES.

The Petition argues that the remedial purpose of the antidiscrimination laws calls for a rule allowing distinctions between affiliated corporations to be disregarded more liberally than traditional veil-piercing would allow; that many circuits have adopted the "four-factor test" as that liberal rule; and that the Seventh Circuit's decision to the contrary creates a circuit split calling for review.

A. No Conflict with This Court Exists.

If it were true that the other circuits adopted a liberal corporate disregard rule based on the statutes' remedial purpose, *they* would be in conflict with the decisions of the Court. The Court made clear in *Bestfoods* that respect for corporate distinctions is a fundamental principle of our law that Congress cannot override unless it does so expressly; the remedial nature of a statute is not enough. 118 S. Ct. at 1884-85. If Congress is silent, a parent company may still be held to account with its subsidiary in at least two situations: when the traditional test for piercing the corporate

veil is met (*id.* at 1885-86), and when the parent itself commits the wrongful conduct at issue (*id.* at 1886-88). These are precisely two of the situations in which the Seventh Circuit recognized that distinctions between corporations may be disregarded. If doing so put the Seventh Circuit in conflict with other circuits, it would be on the right side of the conflict.

B. Generalized Claims of Conflict Are Wrong.

But such conflict does not exist. The Petitioner asserts there is a three-way circuit split by tallying which courts have used the phrase "four-factor test." Petition at 12-15. That label is less important, however, than the substance of what the circuits have said.

For example, the Petitioner counts the Fifth Circuit as embracing liberal construction in light of ADEA's remedial purpose, and as having "expressly . . . adopted the four-factor test" (Petition at 8, 12), even though in *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 777-78 & n.3 (5th Cir. 1997), the Fifth Circuit held that ADEA "plainly contains no basis for disregarding the venerable corporate law principle of limited liability or for otherwise extending liability to a parent corporation for the discriminatory acts of its subsidiary;" that the proper "analysis ultimately focuses on the question whether the parent corporation was a final decision-maker in connection with the employment matters underlying the litigation;" that "[t]he doctrine of limited liability creates a strong presumption that a parent corporation is not the employer of its subsidiary's employees;" that "[o]nly evidence of control suggesting a significant departure from the ordinary relationship between a parent and its subsidiary — domination similar to that which justifies piercing the corporate veil — is sufficient to rebut this presumption;" that because it is

> mindful that "the doctrine of limited liability was originally formulated . . . to implement both economic and democratic goals" and that approaches to piercing the corporate veil which fail to recognize these important public policy considerations underlying the doctrine "are deficient," . . . before piercing the corporate veil in the employment discrimination context, we and other courts have focused . . . on whether the parent corporation was so involved in the daily employment decisions of the subsidiary as to justify treating the two corporations as a single employer;

and that "[c]ommon management and ownership are ordinary aspects of a parent-subsidiary relationship . . . [so] the mere existence of common management and ownership are not sufficient to justify treating a parent corporation and its subsidiary as a single employer."[10] The Petitioner's categorization of the circuits is too shallow to be helpful: there is no actual conflict between the Fifth and Seventh Circuits to resolve.

C. Specific Claims of Conflict are Wrong.

The Petitioner claims that the Seventh Circuit conflicts with other circuits in several specific ways. These specific claims of conflict are equally frail.

1. *Limited Corporate Liability Principle.*

For example, the Petitioner claims the Seventh Circuit is in conflict with other courts by adhering to the common-law presumption of limited corporate liability, which he

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10. (Citation omitted.) The Petition purports to quote *Lusk*, 129 F.3d at 777 & n.3, as saying that a traditional veil-piercing test is "too stringent" in the employment context. Petition at 10. *Lusk* does not say this, or anything like it.

claims should be relaxed "to advance the remedial goals" of the statute. Petition at 9. But the Seventh Circuit is not alone in honoring the presumption of limited liability. In addition to *Lusk*, many other courts join *Bestfoods* in doing so.[11]

2. *Traditional Veil-Piercing.*

The Petitioner also claims the Seventh Circuit conflicts with other courts by invoking the concept of traditional veil-piercing in this context. Petition at 9-10. Again, the Seventh Circuit is not alone, for many courts besides *Lusk* join *Papa* and *Bestfoods* in using the veil-piercing analysis.[12] Indeed,

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11. *See, e.g., Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1362 (10th Cir. 1993) ("The doctrine of limited liability creates a strong presumption that a parent company is not the employer of its subsidiary's employees, and the courts have found otherwise only in extraordinary circumstances."); *Johnson v. Flowers Indus., Inc.*, 814 F.2d 978, 980-81 (4th Cir. 1987) ("Under the doctrine of limited liability, a shareholder is not responsible for the acts of the corporation. . . . Thus, when a subsidiary hires employees, there is a strong presumption that the subsidiary, not the parent company, is the employer. . . . [C]ourts have found parent corporations to be employers only in extraordinary circumstances."); *Lockhard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1071 n.2 (10th Cir. 1998) (same); *Marzano v. Computer Science Corp.*, 91 F.3d 497, 513 (3d Cir. 1996); *Moreno v. John Crane, Inc.*, 963 F. Supp 72, 75 (D.P.R. 1997).

12. *See, e.g., Johnson*, 814 F.2d at 981 ("Courts will peer behind the corporate veil if the parent dominates the subsidiary 'to the extent that the subservient corporation manifests no separate corporate interests of its own and functions solely to achieve the purposes of the dominant corporation.' . . . In an employment context, the parent company can be the employer of a subsidiary's workers if it exercises excessive control in one of two ways. . . . In determining when a parent crosses this line, the courts have found parent corporations to be employers only in extraordinary circumstances.") (internal citation omitted); *Marzano*, 91 F.3d at 513-14; *Shepherdson v. Local Union No. 401 of Int'l Assoc. of Bridge Structural & Ornamental Ironworkers*, 823 F. Supp. 1245, 1249 & n.5 (E.D. Pa. 1993) (Cont'd)

the courts often invoke the "four factors" as elements in a veil-piercing inquiry.[13] And in some cases the courts have

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("[C]orporate law doctrines aid in determining whether under Title VII two entities can be considered a single employer, for jurisdictional and substantive purposes."); *Mas Marques v. Digital Equip. Corp.*, 637 F.2d 24, 26 (1st Cir. 1980) (considering, in combination with the four-part analysis, whether the parent would "be liable on the theory that the parent-subsidiary relationship is a sham") (whether a corporate entity is a "sham" or lacks an "arm's length" relationship with its affiliates belongs to the traditional veil-piercing lexicon, *see Wm. Passalacqua Builders v. Resnick Developers S., Inc.*, 933 F.2d 131, 139 (2d Cir. 1991); *Anderson v. Abbot*, 321 U.S. 349, 357 (1944)); *Frank*, 3 F.3d at 1362 (noting "[t]he doctrine of limited liability creates a strong presumption that a parent company is not the employer of its subsidiary's employees, and the courts have found otherwise only in extraordinary circumstances").

13. *See, e.g., Johnson*, 814 F.2d at 981 n.* (four factors are evidentiary inquiries that may be used to assess control for purposes of veil-piercing inquiry); *Odriozola v. Superior Cosmetic Distribs., Inc.*, 531 F. Supp. 1070, 1075 (D.P.R. 1982) ("the methods devised to determine whether a corporation or corporations should be considered as a single employe[r] under the ADEA are only different means of resolving the same basic inquiry"); *Armbruster*, 711 F.2d at 1335-36 & n.3 (noting that basis for its decision in *Hassell v. Harmon Foods*, 454 F.2d 199, 200 (6th Cir. 1972) — refusing to aggregate employees of parent and subsidiary because the two had separate corporate identities and were not liable for each other's debts — was not inconsistent with the four criteria considered by the NLRB); *McNeal v. Maritank Philadelphia, Inc.*, 1999 WL 80268, at *7 n.8 (E.D. Pa. Feb. 3, 1999) (analysis using the four factors borrowed from NLRB decisions "essentially the same" as determining whether one corporation is an "alter ego" of another). Some courts even embed within the "four-part test" the classic veil-piercing requirement that entities be fairly considered a "sham." *See Swallows v. Barnes & Noble Book Stores, Inc.*, 128 F.3d 990, 995 (6th Cir. 1997) ("If neither of the entities is a sham then the fourth test [common ownership or financial control] is not met.")
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done so outside the context of aggregating employees to meet the definition of "employer," when plaintiffs sought to pierce the corporate veil for more typical reasons, such as insolvency of the subsidiary. Nothing could make more plain that the four-part test is a proxy for traditional veil-piercing analysis, and seeks to capture the same considerations.[14]

The Petitioner states that "the Seventh Circuit's veil-piercing test is undesirable because it subjects federal antidiscrimination statutes to state law veil-piercing tests that may vary widely; as a result, similarly-situated plaintiffs and employers may face different standards in each state." Petition at 10. This is a complaint properly made only to

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(internal quotation and citation omitted); *York v. Tennessee Crushed Stone Assoc.*, 684 F.2d 360, 363 (6th Cir. 1982) (under the "four factor" approach, court stated that while "there may be occasions in which it is proper to disregard the corporate entity for the purpose of finding the jurisdictionally required number of employees in a Title VII or ADEA suit, this is not such a case. There are no grounds upon which it may be said that the defendant association is a 'sham' and, therefore, should be disregarded.") (citations omitted); *Fike v. Gold Kist, Inc.*, 514 F. Supp. 722, 725 (N.D. Ala.) ("two corporations can be treated as a single entity . . . only when the facts show that the separate existence of the two corporations was a sham"), *aff'd*, 664 F.2d 295 (11th Cir. 1981).

14. *See, e.g., Murray v. Miner*, 74 F.3d 402, 404-05 (2d Cir. 1996) (applying four-factor analysis where employees of defunct corporation brought suit against successor corporation's principal shareholders, expressly characterizing the analysis as a kind of veil-piercing reserved for "extraordinary circumstances"); *Marzano*, 91 F.3d at 513-14 (applying four-factor analysis to determine whether parent should be liable for discriminatory acts of subsidiary, expressly characterizing the inquiry as whether to override the presumption of limited corporate liability by piercing the corporate veil); *Brown v. Vitelcom, Inc.*, 47 F. Supp. 2d 595, 599-600 (D.V.I. 1999) (applying the four-factor analysis to determine "whether to look behind the corporate veil" and hold parent liable for discriminatory acts of subsidiary).

Congress. As the Court held in *Bestfoods*, the background common law standard applies unless Congress expressly provides otherwise. But the concern is also unfounded: "[t]here are a sufficient number of federal decisions dealing with shareholder liability that one can decipher a sort of generalized federal substantive law on disregard of corporate entity;" and since that federal law draws on state law for guidance, whether federal or state law applies presents a question of "little practical significance." *In re Acushnet River & New Bedford Harbor Proceedings Re Alleged PCB Pollution*, 675 F. Supp. 22, 33 (D. Mass. 1987) (citation and internal quotation omitted). In any event, there is little difference between the veil-piercing law of each state. *See Japan Petroleum Co. (Nigeria) Ltd. v. Ashland Oil, Inc.*, 456 F. Supp. 831, 841 n.17 (D. Del. 1978) (in considering whether to hold parent liable for subsidiary's obligations, court stated that certainty as to the proper choice of law was unnecessary because "general principles of corporate and agency law . . . do not vary significantly from jurisdiction to jurisdiction").

The Petitioner also protests that the Seventh Circuit's approach will deny "countless victims of discrimination" access to the courts because their claims will not be decided by the "more flexible four-factor test." Petition at 15. This suggestion that courts should disregard the corporate form, in order to manipulate the statutory minimum-employee requirements Congress has prescribed, once again flies in the face of *Bestfoods*.

3. *Need for Direct Involvement (Control of Labor Relations) by Parent.*

The Petitioner also protests that two of the Seventh Circuit's three tests "require[ ] actual evidence of direct involvement of the parent company." Petition at 10. The Seventh Circuit is hardly alone on this issue. As discussed in Section I, the NLRA cases make the parent's "actual and

active control of labor relations" the *key* criterion, and the same holds true in cases arising under the antidiscrimination statutes. Case after case holds that under the nominal "four-factor test" the parent's direct involvement in the alleged act of discrimination is the central and critical criterion:

> Courts applying this four-part standard in Title VII and related cases have focused on the second factor: centralized control of labor relations. This criterion has been further refined to the point that "[t]he critical question to be answered then is: What entity made the final decision regarding employment matters relating to the person claiming discrimination?"

Trevino v. Celanese Corp., 701 F.2d 397, 404 (5th Cir. 1983) (alteration in original) (citations omitted) (quoting *Odriozola*, 531 F. Supp. at 1076).[15] Indeed, the Seventh Circuit noted

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15. *See also, e.g.*, *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1240-41 (2d Cir. 1995) (same); *Evans v. McDonald's Corp.*, 936 F.2d 1087, 1090 (10th Cir. 1991) (same); *Hukill*, 1999 WL 739407, at *7 (same); *Johnson*, 814 F.2d at 981 n.* (no need to adopt four-factor test, because "the factors all point to the ultimate inquiry of parent domination"); *Lusk*, 129 F.3d at 777 ("[The four-factor] analysis ultimately focuses on the question whether the parent corporation was a final decision-maker in connection with the employment matters underlying the litigation, and all four factors are examined only as they bear on this precise issue.") (citations omitted); *Skidmore v. Precision Printing & Packaging, Inc.*, 1999 WL 710539, at *7 (5th Cir. Sept. 13, 1999) ("Traditionally . . . courts have focused almost exclusively on one question: which entity made the final decisions regarding employment matters relating to the person claiming discrimination?"); *Swallows*, 128 F.3d at 994 ("None of these factors is conclusive, and all four need not be met in every case. Nevertheless, control over labor relations is a central concern.") (citations omitted); *Armbruster*, 711 F.2d at 1337 (while four-part test provides "guidance," "control over the elements of labor relations is a central concern"); *Herman v. United Bhd. of Carpenters*

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that in many cases reciting the "four-factor test," "the focus of the opinions is on whether the parent corporation made the personnel decision — committed the discriminatory act — of which the plaintiff was complaining." App. A-4. The Seventh Circuit's restatement of that principle places it in the mainstream of the circuits, not in conflict with them.

4. *Unimportance of Common Ownership.*

To suggest that the line between Walsh and Katy should be blurred, the Petitioner relied heavily on aspects of their relationship as company and shareholder/owner: Walsh reported information upstream to its owner, and Katy provided services (like the opportunity to participate in employee benefits plans) downstream to its subsidiaries, including Walsh. The Seventh Circuit stated that the "factor" of "common ownership" was "useless." App. A-4. In this observation it was also in the mainstream of authority, both from NLRA cases and from cases under employment discrimination statutes. As discussed in Section I, the Board treats the "factor" of "common ownership" as insignificant, and employment discrimination cases follow suit:

> Common management and ownership are ordinary aspects of a parent-subsidiary relationship. . . . Courts have recognized that the mere existence of common management and

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& Joiners, 60 F.3d 1375, 1384 (9th Cir. 1995) (requiring evidence of "inter-relationship between the day-to-day operations" of the affiliates); *Frank*, 3 F.3d at 1363 ("The critical question is, '[w]hat entity made the final decisions regarding employment matters related to the person claiming discrimination?' ") (alteration in original) (quoting *Trevino*, 701 F.2d at 404); *Llampallas v. Mini-Circuits Lab., Inc.*, 163 F.3d 1236, 1244-45 (11th Cir. 1998) (four-part inquiry focuses on "the degree of control an entity has over the adverse employment decision on which the Title VII suit is based"), *cert. denied*, 1999 WL 592941 (U.S. Oct. 12, 1999).

> ownership are not sufficient to justify treating a parent corporation and its subsidiary as a single employer.

Lusk, 129 F.3d at 778. As the cases often bluntly state, "common ownership . . . , standing alone, can never be sufficient to establish parent liability." *Lockhard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1071 (10th Cir. 1998) (quoting *Frank*, 3 F.3d at 1364).[16]

Just as ownership itself carries no weight in the analysis, neither do the ordinary incidents of ownership. The Seventh Circuit noted that a small firm's taking advantage of services available within its corporate family — like pension plans, employee benefits, accounting services, group insurance — does not destroy the independence and legal autonomy of the parent and subsidiary. App. A-8-9. The Seventh Circuit's observations do not conflict with the other circuits' holdings. The courts agree, for example, that "it is not beyond the normal parent-subsidiary relationship for the parent to serve as ERISA Plan Administrator for the subsidiary, [and this does not] evidence[ ] excessive control" by the parent. *Frank*, 3 F.3d at 1363.[17]

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16. *See also, e.g., Hukill*, 1999 WL 739407, at *7 (same); *Frank*, 3 F.3d at 1364 (same); *Johnson*, 814 F.2d at 980 (" '[o]wnership of a controlling interest in a corporation entitles the controlling stockholder to exercise the normal incidents of stock ownership, such as the right to choose directors and set general policies, without forfeiting the protection of limited liability' ") (alteration in original) (quoting *Baker v. Raymond Int'l, Inc.*, 656 F.2d 173, 180 (5th Cir. 1981)).

17. *See also Marzano*, 91 F.3d at 514 (participating in parent's pension plan does not make parent the employer); *Moreno*, 963 F. Supp. at 76 (subsidiary's use of accounting services did not make parent and subsidiary a single enterprise); *Evans*, 936 F.2d at 1090 (affiliate's inspections, training, oversight did not make it employer);

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D. Conclusion.

The Seventh Circuit declined to use the label "four-factor test" in considering the claim that Walsh and Katy should be aggregated. The fact that certain other circuits have used that label does not signal a circuit split, as the Petitioner contends. Labels aside, none of the Seventh Circuit's substantive observations is unprecedented, but on the contrary each is well supported by law in other circuits. Indeed, only the position urged by the Petitioner could create a conflict — one with the Court's holding in *Bestfoods*.

Though not every circuit uses the same verbal formula to describe the inquiry regarding aggregation of affiliated companies, the circuits continue to refine and incrementally sharpen their analyses, both under the NLRA and under the antidiscrimination statutes, as they have for more than 40 years. In the absence of stark conflict there is no reason to grant review.

III. THERE IS NO UNSETTLED ISSUE OF GREAT IMPORTANCE.

Not only is there no conflict calling for review, but the issues presented here are not of such great importance as to call for review. The issues as they relate to the resolution of the Petitioner's particular case lack great importance, because the facts present here could not support relief under any formulation of the test for aggregation. Nor are there unsettled issues of great importance generally, for there is no substantive rift among the circuits, and in any event the courts have no power to grant the relief requested.

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Stanford v. Bramble USA, Inc., 1999 WL 495466, at *4 n.4, 7 (N.D. Ill. June 30, 1999) (parent's sponsorship of employee benefit plan does not make it employer); *Hukill*, 1999 WL 739407, at *6 (affiliate's providing administrative services did not make it employer) (citing *Papa*).

A. Lack of Importance to the Petitioner's Case.

As the Seventh Circuit observed, Walsh and Katy complied with all the formalities required to preserve their separate corporate identities. App. A-2. The facts urged as a basis to aggregate them are the kind of intra-corporate-family contacts (e.g., shared pension plan, insurance providers, benefit plans, reporting relationships) that are universally acknowledged to be insufficient to justify aggregation. However the statement of the test for aggregation might be refined, it would not alter the outcome here. This is not a case in which the interplay of issues would sharpen the debate and enrich the legal discourse. It is therefore unworthy of review.

B. Lack of Importance Generally.

Nor are there abstract areas of debate where the law is gravely uncertain or the courts divided. The issues of whether and under what circumstances separate corporate identities should be disregarded are not new or novel.

The only great division in the courts identified by the Petition is one of nomenclature: whether the test should be called "the four-factor test" (even though courts frequently state that one question — common ownership — answers nothing, and another — who committed the discriminatory act — is solely critical) or whether it is permissible to abandon that label for another. As discussed above, there is more debate about the name than about substance.

The Petitioner also argues that the case is important because of the "remedial" nature of the statutes at issue. That argument is a naked plea for relief: a desire to obtain by construction what Congress failed or refused to do in legislation, simply from disappointment at being just beyond the reach of the legislation as written.

The Petitioner raises the issue of legislative history, criticizing the Seventh Circuit for assertedly understating the statutes' purposes; but he does not explain how his proposed alternative view of the statutes' purpose makes a difference in answering the issue presented. In fact there is no useful legislative history to explain the small-employer exemptions in the statutes. One of the cases the Petitioner cites confirms there is no legislative history of the ADEA provision, and instead analogizes to Title VII. *Morelli v. Cedel*, 141 F.3d 39, 45 (2d Cir. 1998). Another case, construing Title VII, features a debate between the majority and dissent over the insights to be drawn from congressional floor debates (the least useful kind of history). *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1314, 1322 (2d Cir. 1995). In any event, the purpose of the small-employer provision could not be (as some floor debaters suggested) to serve as a proxy for interstate commerce, because each statute's definition of "employer" separately requires an effect on interstate commerce.

The most that can be said about the small-employer exemptions is that they are protective of small employers. As the Court made clear in *Bestfoods*, the courts cannot, even for a "good" cause, override corporations' limited liability without express congressional authority. Here, Congress did not grant such authority, but on the contrary enacted legislation protective of corporations as small as Walsh. This case lacks importance generally because the kind of relief the Petitioner seeks — modification of protected corporations' limited liability, based solely on asserted remedial aims Congress did not codify — is beyond the power of the courts to grant.

CONCLUSION

The issue presented here is not worthy of review because it presents neither a split in the circuits nor an unsettled question of great importance. Indeed, the case is particularly unworthy of review, both because (given the facts) this Petitioner could not win relief for himself even under his requested formulation of the test for disregarding corporate form, and because (given any facts) no party could win the kind of relief sought here (a softening of the standards for corporate disregard) in light of the Court's decision in *Bestfoods*. The petition for writ of certiorari therefore should be denied.

Respectfully submitted,

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